

SETTLEMENT COMMUNICATION - Subject to Federal  
Rule of Evidence Rule 408

April 2, 2015

VIA E-MAIL AND U.S. MAIL

Mr. Thomas Krueger (C-14J)  
Assistant Regional Counsel  
U.S. Environmental Protection Agency,  
Region 5  
77 W. Jackson Blvd  
Chicago, Illinois 60604-3509

Syed Quadri (SR-6J)  
Remedial Project Manager  
U.S. Environmental Protection Agency,  
Region 5  
77 W. Jackson Blvd  
Chicago, IL 60604-3590

Re: Good Faith Offer –  
Lusher Street Groundwater Contamination Site  
Operable Unit 1 Interim Remedy, Elkhart, Elkhart County, Indiana

Dear Mr. Krueger and Mr. Quadri:

In response to a Special Notice Letter dated February 2, 2015, from the United States Environmental Protection Agency Region 5 (“EPA” or the “Agency”), the Parties listed on Exhibit A (the “Parties”) transmit this Good Faith Offer in accordance with Section 122(e) of CERCLA. This letter demonstrates the Parties’ willingness – collectively – to negotiate with EPA to conduct or finance the Operable Unit 1 Interim Remedy (the “Interim Remedy”) for the Lusher Street Groundwater Contamination Site (the “Site”) subject to the concerns, conditions and reservations of rights set forth below. As set forth below, the submission of this Good Faith Offer is under a full reservation of all rights and defenses. Further, the negotiation or performance of work at the Site shall not constitute any admission against interest, any admission of any fact, or any admission of responsibility or liability by any Party.

**A. Good Faith Offer Elements**

The elements of the Good Faith Offer specified in the Special Notice Letter are set forth below. For your convenience, the following headings of the required elements are presented in the order set forth in the Special Notice Letter.

**1. A statement of willingness and financial ability to implement the requirements of the ROD, the proposed Consent Decree and Statement of Work that provides a sufficient basis for further negotiations.**

As EPA acknowledges, the Parties are not large companies and their financial resources are limited due to the size of their business operations. Each of the Parties is either attempting to determine the availability of insurance coverage or is in the process of attempting to obtain coverage from known insurers. Although efforts to seek and obtain insurance coverage are proceeding, it was not possible to complete these efforts by April 3. Further, Sturgis Metals, the PRP who EPA has identified as the largest contributor to groundwater impacts, is bankrupt and is not participating. Certain of the Parties have begun to investigate the existence of insurance policies which may afford coverage for the Sturgis Metals at the Site, but that investigation also requires additional time to complete. Accordingly, the Parties need additional time before they can provide a representation regarding the financial ability to perform the work.

**2. A demonstration of the PRPs' technical capability to carry out the Interim Remedy including the identification of the firm(s) that may actually conduct the work or a description of the process they will use to select the firm(s).**

Through either or both internal or external resources, the Parties expect to have the technical capability to conduct the work. Provided a mutually acceptable agreement can be negotiated, the Parties intend to review qualified contractors and select one or more contractors with the demonstrated ability to oversee and/or implement the subject work. The Parties also intend to evaluate whether the City of Elkhart's Public Works & Utilities Department may have the technical capability and willingness to perform work associated with connection to potable water. The April 3 deadline for submitting this Good Faith Offer did not allow sufficient time to complete the evaluation. Certain Parties have already enlisted the help of outside consultants who have experience in performing remedial work under CERCLA.

**3. A detailed statement of work or work plan identifying how you intend to proceed with the remedial action.**

Based on our review of Site documents describing relevant data and the scope of the Interim Remedy, a variety of issues and concerns regarding water supply connections and vapor intrusion mitigation systems will require further discussion with EPA before a detailed statement of work or work plan can be prepared. Assuming we can address issues relating to potable water connections and/or vapor intrusion mitigation systems, the Parties will then be able to provide the applicable statement of work or work plan.

**4. A statement of willingness by the PRPs to reimburse EPA for costs incurred in overseeing implementation of the remedial action.**

The Parties acknowledge EPA's authority under CERCLA to seek reimbursement of eligible oversight costs, but the Parties would like to explore alternatives that would allow EPA to reserve its right to recover costs while exercising its discretion whether to collect such costs or to postpone collecting some or all of these costs from the Parties during the performance of the work. A commitment to reimburse oversight costs at this time imposes an undue burden on a small subset of the alleged PRPs for the Site. In addition, if potable water connection work is ultimately performed by the City of Elkhart Public Works & Utilities Department, field oversight of this work by the Agency (or its outside contractor) is unnecessary given the experience of the City in performing such work.

**5. A response to the proposed Consent Decree and Statement of Work.**

Please see the response to paragraph 3 above regarding the Statement of Work. As the EPA stated during the March 17 meeting in Elkhart, the proposed Consent Decree has not yet been provided by the Agency pending further discussions with PRPs.

**6. A list identifying each party on whose behalf the offer is being made, including name, address, and telephone number of each party.**

The requested information is provided in Exhibit A to this letter.

**7. The name, address, and phone number of the party who will represent you in negotiations.**

Exhibit A to this letter identifies one or more individuals for each of the Parties who will represent that party in the negotiations along with their respective contact information.

**B. Request for Meeting**

The Parties appreciate EPA's participation in the March 17 meeting in Elkhart. The Parties request a subsequent meeting in the very near future to discuss the significant issues raised below. Given the tight time frame established by the Special Notice Letter, and depending upon the outcome of further discussions with EPA, we reserve the right to raise additional comments and propose additional revisions concerning the scope and content of the remedial action work during our negotiations.

**C. Discussion Points**

The matters we want to discuss with EPA include the following issues:

### **1. Sufficiency of EPA's Information to Identify PRPs**

The Parties have a general concern as to whether so-called "nexus" information is sufficient to establish PRP status for some or all of the Parties. In several instances, it appears that Parties were identified as PRPs because their facility at one time or another used one or more of the constituents detected in the plume. But there is no factual basis on which to support a finding that their facility actually caused or contributed to a release of any such constituents to the environment. Similarly, while EPA mentioned at the March 17 meeting that it relied on sampling data to support its PRP findings, the sampling data does not consistently identify higher levels of contaminants on or downgradient of a Party's facility than may already exist upgradient of the facility. There does not appear to be a consistent pattern of upgradient sampling to support EPA's apparent finding that a "downgradient" facility contributed contaminants to the plume.

Similarly, we note that soil samples were collected by EPA as part of its prior investigation, some of which were from properties on which the Parties' facilities are located. As part of our negotiations, we request that EPA provide soil sampling results relating to the Parties' respective facilities. We are requesting this information because soil sampling results presently available may not support a finding that constituents of concern in the plume reflect a release at or below the ground surface by the respective Party.

### **2. Incomplete PRP Investigations and Additional PRPs**

Additional parties should have received the Special Notice Letter. Based on the information contained in EPA records, there is substantially the same, or in some cases even more, "nexus" information against parties who did not receive the Special Notice Letter. As mentioned during the March 17 meeting, EPA did not involve parties who refused access to their property but who otherwise satisfy the criteria used by EPA to identify PRPs at the site. We intend to prepare a list of the entities along with relevant nexus information to present to the EPA for consideration as part of these negotiations.

As part of this Good Faith Offer, we submit that additional parties should be added to the PRP list for this Site. The Parties may seek EPA's assistance in obtaining commitments to finance the work from additional parties who have not joined in this Good Faith Offer or who have not yet been notified by the Agency that they are a PRP for the Site.

### **3. EPA's Intent to Perform Source Investigation Work in the Future**

During the March 17 meeting, EPA's representatives indicated that work to identify the source or sources of the OU1 plume will commence after the completion of the Interim Remedy. The proposed postponement of source identification work threatens to significantly prejudice the interests of the Parties to this Good Faith Offer. It is standard CERCLA practice to identify the

source(s) of contamination before selecting a remedy, because the remedy needs to address source control. The postponement of source investigation work may have lead EPA to draw the scope of the Interim Remedy too broadly. For many of the potential homes to be included in the water supply connection work and/or the soil vapor mitigation system work, there is no existing data to support their inclusion, only the “potential” of a future threat. In the absence of source investigation work, the scope of the Interim Remedy may not be appropriately delineated.

The source investigation work may also show that certain Parties did not cause the groundwater contamination on which the Interim Remedy is based and hence they are not jointly and severally liable for response costs. The Parties would like to discuss with EPA its plans regarding source investigation work and appropriate legal protection for the participating Parties so that they are not prejudiced if they step forward and finance the Interim Remedy in the meantime.

#### **4. The Elements of the Interim Remedy**

The Parties believe that the designation of the “remedial areas” and the TCE vapor intrusion (VI) “area of concern” warrant further consideration and refinement. We would anticipate negotiating these matters prior to or as part of the Statement of Work and/or remedial design for the Interim Remedy.

#### **5. Deferral of EPA Past Costs**

The Special Notice Letter also demands the payment of EPA’s response costs. The Parties recognize EPA’s authority to recover certain eligible response costs under CERCLA. In light of the facts of this matter, however, the Parties propose that EPA defer its claim for reimbursement at least until completion of the Interim Remedy.

As noted earlier, further investigation, particularly source investigation work, may show that parties who perform the Interim Remedy may not be responsible, either for all or certain of these costs. Once Site conditions are better known, EPA will have the information needed to determine whether and to what extent any performing Party may be responsible for any costs that were deferred.

Further, there are clearly “orphans” that are or will be associated with Site conditions. EPA’s orphan share policy provides that orphan share compensation is to be calculated on the basis of total remedial costs, which cannot be determined until a full and complete remedy has been selected. EPA will then have discretion to forgive past costs as a form of orphan share compensation to the parties performing the work. At the very least, it is premature to assess any past costs until total remedial costs can be estimated and the orphan share determined.

Finally, given the small number and make up of the Parties, the need to recoup past costs at this time would impose a significant financial burden on the Parties and jeopardize the prospects for negotiating a consent decree designed to address the health-based rationale for Interim Remedy.

#### **D. Conclusion**

This Good Faith Offer is expressly subject to and conditioned upon the following: (a) each Party expressly reserves all rights and defenses – factual, legal or otherwise – that may apply now or hereafter, resulting in a full reservation of rights and defenses, (b) a formal commitment to perform and/or finance the Interim Remedy will be subject to the negotiation of an agreement satisfactory to EPA and each Party after review by respective Party management, and (c) each Party reserves the right to participate in a final agreement – or not to participate – depending upon the terms of such agreement, an adequate number of participating Parties at the time of formal commitment, and any other consideration deemed relevant by each Party. Further, the submission of this Good Faith Offer is not – and shall not be construed as – an admission of liability for the Site by any Party. Each Party specifically denies any liability with respect to the Site.

The Special Notice calls for significant negotiations over a very constrained time frame. The Parties' representatives are available to meet with the EPA to address this effort as soon as reasonably possible.

Thank you for your consideration of these matters, and we look forward to meeting with EPA at a mutually convenient time and place. If you have any questions regarding the Good Faith Offer, please contact any of the Parties listed on Exhibit A.

Very truly yours,

Parties Listed on Exhibit A

**EXHIBIT A**  
**PARTIES TO APRIL 2, 2015 GOOD FAITH OFFER**  
**LUSHER STREET GROUNDWATER CONTAMINATION SITE**

PARTY	PARTY'S REPRESENTATIVE
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Elkhart Plating Corp. 1913 S. 14 <sup>th</sup> Street P.O. Box 74 Elkhart, IN 46515	James V. Woodsmall Warrick & Boyn, LLP 121 W. Franklin Street, Suite 400 Elkhart, IN 46516 (574) 294-7491 (574) 294-7284 (facsimile) jwoodsmall@warrickandboyn.com
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**PARTIES TO APRIL 2, 2015 GOOD FAITH OFFER**  
**LUSHER STREET GROUNDWATER CONTAMINATION SITE**

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